

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Employers Mutual Casualty Company,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. <u>18-4029</u>
)	
Brant Lake Sanitary District, a Political)	
Subdivision of the State of South)	
Dakota; and, Excel Underground, Inc.,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff brings this action for declaratory judgment and states as follows:

Parties

1. Plaintiff Employers Mutual Casualty Company (hereinafter “EMCC”) is an insurance company doing business in the State of South Dakota.
2. Defendant Brant Lake Sanitary District (hereinafter “Brant Lake”) is a Political Subdivision organized in South Dakota for purposes of developing a sanitary sewer system around Brant Lake.
3. Defendant Excel Underground, Inc. (hereinafter “Excel”) is a South Dakota corporation in the business of excavation and sewer construction.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

Jurisdiction and Venue

4. Jurisdiction is conferred upon this court by 28 U.S.C. § 1332 in that the matter in controversy exceeds Seventy-Five Thousand Dollars (\$75,000) and there is complete diversity of citizenship.

5. Plaintiff Employers Mutual Casualty Company is a foreign corporation with its principal place of business located in Des Moines, Iowa.

6. Defendant Brant Lake Sanitary District is a Political Subdivision incorporated in the state of South Dakota with its principal place of business located in Lake County, South Dakota.

7. Defendant Excel Underground, Inc. is a South Dakota corporation with its principal place of business located in Sioux Falls, South Dakota.

8. Venue is proper in this court as the contract of insurance made the subject of this controversy was delivered in Lake County, South Dakota and it is appropriate that a South Dakota court interpret this contract.

9. The declaratory remedy sought in this action is authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201, and by Rule 57 of the Federal Rules of Civil Procedure.

The Underlying Litigation

10. This dispute arises out of a breach of contract lawsuit pending in the Circuit Court of Lake County, South Dakota. A copy of the Complaint in that action is attached as **Exhibit A**.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

11. Excel sued Brant Lake alleging breach of a contract for construction of a wastewater collection system.

12. Following commencement of Excel's action the parties litigated various counterclaims, crossclaims, and third-party complaints, and Excel's action was consolidated with a related lawsuit pending in the same court.

13. All issues were tried to a Lake County jury, over the course of two weeks in January, 2018. The only claim against Brant Lake submitted to the jury was a claim for breach of contract. A copy of the state court's instructions to the jury is attached as **Exhibit B**. On February 1, 2018, a verdict was rendered in favor of Excel, and against Brant Lake, in the amount of \$1,569,691.81. All claims asserted by Brant Lake were denied. A copy of the special verdict is attached as **Exhibit C**.

14. On February 20, 2018, judgment was entered. A copy of the judgment is attached as **Exhibit D**.

15. Excel's state court action remains pending. Upon information and belief the judgment of that court will soon be appealed to the South Dakota Supreme Court by Brant Lake.

16. The issues raised in this complaint for declaratory judgment have not been raised in the state court action.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

Allegations & Claims for Declaration

17. At all times material to Excel's action against Brant Lake, EMCC insured Brant Lake under its *Linebacker Public Officials and Employment Practices Liability Policy*. A copy of that policy is attached as **Exhibit E**.

18. Under a reservation of rights, EMCC has provided Brant Lake with "Defense and Defense Expenses" as provided in the policy. (See Exhibit E: Linebacker, CL7001 (10-2), Page 1 of 8, **SECTION I-COVERAGES, 3. Defense and "Defense Expenses"**).

19. Brant Lake has demanded that EMCC provide a supersedeas bond in connection with Brant Lake's anticipated appeal of the state court judgment. Under the policy, EMC has no obligation to apply for or furnish such bond. (See Exhibit E: Linebacker, CL7001 (10-2), Page 2 of 8, **SECTION I-COVERAGES, 4. Supplementary Payments**, at **4. a. (2)**).

20. Brant Lake has demanded that EMCC provide legal counsel for an appeal on behalf of Brant Lake. Under the policy, any obligation EMC has to pay defense expenses ends after the entry of judgment, and EMC has no obligation to pay for attorney fees incurred by Brant Lake in connection with any appeal it may file. (See Exhibit E: Linebacker, CL7001 (10-2), Page 1 of 8, **SECTION I-COVERAGES, 3. Defense and "Defense Expenses"**, at **3. a. (4)**). However, without waiver of any of its rights, EMC will continue to pay defense expenses until it receives a judicial declaration as prayed for in this action.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

21. Brant Lake has demanded that EMCC indemnify Brant Lake for any monetary damages owed Excel once final judgment is entered in the Circuit Court action. Damages arising out of a breach of contract are excluded by the absolute “Contractual Liability” exclusion of the policy. (See Exhibit E: Linebacker, CL7001 (10-2), Page 3 of 8, **SECTION I-COVERAGES, 5. Exclusions-Coverage A and Coverage B d. Contractual Liability**).

22. EMCC and Brant Lake disagree on whether there is insurance coverage under EMCC’s Linebacker policy for the claims for coverage now being asserted by Brant Lake.

23. There is no nondeclaratory relief sought by EMCC in this action.

Claim for Declaratory-Judgment

24. EMCC seeks this Court’s declaration of the rights and liabilities of the parties under the terms of the Linebacker policy issued to Brant Lake.

25. EMCC asserts that this Court’s judgment will serve a useful purpose in clarifying and settling the terms of the insurance contract, as well as afford relief from the uncertainty, insecurity, and controversy arising out of the interpretation of the contract.

26. Further, EMCC asserts there is no better or more efficient alternative remedy than to obtain this Court’s judgment on the legal issues raised by the contract between EMCC and Brant Lake.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

27. EMCC respectfully requests a speedy hearing on this declaratory-judgment action.

WHEREFORE, Plaintiff respectfully requests a declaration by this Court of the rights and liabilities of the parties under the terms of the policy that:

(1) EMCC is not obligated to pay “defense expense” beyond those provided through entry of judgment in the Circuit Court action on February 20, 2018, or as otherwise agreed to by EMCC during the pendency of this declaratory judgment action;

(2) EMCC has no obligation to provide or pay for the cost of a supersedeas bond in connection with any appeal that Brant Lake may prosecute in the state court action;

(3) EMCC is not obligated to indemnify Brant Lake for damages it may owe Excel upon entry of a final judgment.

EMC also requests that this court grant EMCC such other and further relief to which it may demonstrate itself justly entitled.

Complaint for Declaratory Judgment
EMCC v. Brant Lake, et al

Dated this the 8th day of March, 2018.

ROBINS KAPLAN LLP

***(APPLICATION FOR ADMISSION IN
PROCESS)***

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